STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

PROPERTY AND SPECIAL TAXES DEPARTMENT
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November 7, 2013

Dear Interested Party,

Attached is a copy of Special Taxes and Fees Current Legal Digest (CLD) Number 2013-1 for your information and review. This CLD contains an affirmation and update to an existing annotation and the addition of two annotations. Please review and submit any questions, comments, or suggestions for changes by December 9, 2013, using the electronic CLD Comments Form at http://www.boe.ca.gov/sptaxprog/cld_comments.htm, or if you prefer, you may mail your written comments to:

Board of Equalization
Special Taxes and Fees Annotation Coordinator, MIC: 31
P.O. Box 942879
Sacramento CA 94279-0031

Please note, the new annotations and/or suggested revisions of existing annotations contained in the attached CLD are drafts and may not accurately reflect the Board's official position on certain issues nor mirror the language that will be used in the final annotation.

CLDs are circulated for 30 days. During this period, any questions that arise are addressed and suggested modifications are taken into consideration. After review of the final version by the Board's Legal Department, these changes will be included in Volumes 3 and 4 of the *Business Taxes Law Guide*. At that time, the CLD becomes obsolete.

If you have any questions, please contact Robert Zivkovich at 1-916-324-2775.

David J. Gau,
Deputy Director
Property and Special Taxes Department

DJG: rz

Enclosures: Special Taxes and Fees Current Legal Digest 2013-1
Redacted Legal Opinion (November 2, 2012 relating to the Cigarette and Tobacco Products Licensing Act)
Redacted Legal Opinions (August 14, 2012 and October 10, 2012) relating to the Hazardous Substances Tax – Environmental (Corporation) Fee)

SPECIAL TAXES CURRENT LEGAL DIGEST NO. 2013-1

November 7, 2013

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SPECIAL TAXES AND FEES ANNOTATIONS

CIGARETTE AND TOBACCO PROUCTS LICENSING ACT

Add Annotation and Heading

Mobile Sellers of Cigarette or Tobacco Products

A retail location must be a building or a vending machine. A catering truck from which cigarette or tobacco products are sold is not a building or vending machine and, therefore, may not be licensed as a retail location. 11/02/12

HAZARDOUS SUBSTANCES TAX

ENVIRONMENTAL (CORPORATION) FEE

Affirm and Update Annotation and Heading

Determining the Number of Hours Employees Are Employed ~~Under the Environmental Fee~~

Once a person is hired as an employee, the employer has control over how that employee spends the hours of the workday, including whether or not to grant paid time off during those workday hours for vacation, illness, and holidays and whether or not the employee must work his or her assigned hours on a particular workday. Therefore, for the purposes of the Environmental Fee statute and calculation of the number of employees "employed [in California] for more than 500 hours," the term "employed" includes the hours for which an employee is paid by the ~~corporation~~ organization, even when the employee is absent due to vacation, illness, or holidays, for the duration of his or her employment. On the other hand, once the person is no longer employed by the ~~corporation~~ organization—i.e., is no longer "engage[d], suffer[ed], or permit[ted] to work," the employer no longer "has . . . control [or] determination of the hours of work" of the employee. Therefore, any hours included in the calculation of a terminated employee's severance pay or sick or vacation time cash out should not be included when calculating the number of hours a person was employed during a calendar year for purposes of determining the Environmental Fee owed by the ~~corporation~~ organization for that year. 3/21/06, affirmed and updated 8/14/12.

Please note that the new proposed annotation contained in this CLD is a draft and may not accurately reflect the text of the final annotation

Add Annotation and Heading

Job Corps Center Operators and Service Providers

Job Corps Center operators and service providers are determined to be "federal instrumentalities" for purposes of the Environmental Fee. Under the United States Constitution, states are prohibited by the supremacy clause (art. VI, § 2) from imposing any tax on any activity, agency, or instrumentality of the federal government unless Congress expressly waives the federal government's sovereign immunity from state taxation under specific circumstances. California's Third District Court of Appeal concluded that the Environmental Fee imposed under Health and Safety Code section 25205.6 is a constitutionally valid "tax," not a fee, and there is no evidence in the law that Congress has waived federal immunity with respect to the Environmental Fee (i.e., tax). Accordingly, as federal instrumentalities, Job Corps Center operators and service providers are exempt from paying the Environmental Fee pursuant to the supremacy clause of the United States Constitution. 10/10/12.

Legal Opinion Dated November 2, 2012

Relating to the Cigarette and Tobacco Products Licensing Act

State of California

Board of Equalization
Legal Department - MIC:82
Telephone: (916) 323-3248
Facsimile: (916) 323-3387

Memorandum

To: Ms. Lynn Bartolo, Chief
Policy and Compliance Division (MIC:57)

Date: November 2, 2012

From: Pamela Mash PM
Tax Counsel
Tax and Fee Programs Division (MIC:82)

Subject: Mobile Sellers of Cigarette and Tobacco Products
Assignment No. 12-239

I am writing in response to your May 18, 2012 memorandum to Christine Bisauta in which you presented questions related to the interpretation of Business and Professions Code section (section) 22972. Section 22972 provides that a cigarette and tobacco products retailer that owns more than one "retail location" must obtain a separate retailer license for each "retail location." A "retail location" is defined as both (1) any building from which cigarettes or tobacco products are sold at retail and (2) a vending machine. (Bus. & Prof. Code, § 22971, subd. (q).)

In your memorandum and follow-up emails, you present a number of questions regarding a retailer's licensing requirements when sales of cigarettes and tobacco products are made by mobile vendors, at special events, and at private parties. Each of your specific questions and the Department's current practices are set forth below, with my response following.

> (1) Does the definition of "retail location" mean only store front type of buildings, i.e., permanent structures? Special Taxes has been advised previously that the above mentioned definition of "retail location" means a location that has an identifiable street address from which sales can be conducted (excludes private mail box service centers, etc). This interpretation has been applied to mobile vendors, special events and for private parties. This could be expanded to allow a catering truck that stops at the same locations every day to hold retailer licenses for each of those "stops" if they wish to make cigarettes and tobacco products sales. Special Taxes would require that the locations from which sales are to be made be listed as sub locations under the owner's SUT permit.

A retail location must be a building or a vending machine. (Bus. & Prof. Code, § 22971, subd. (q).) The term "building" is not defined in the Business and Professions Code, but "building" is defined in the Health and Safety Code to mean any structure used for support or shelter of any use or occupancy, and includes a structure wherein things may be grown, made, produced, kept, handled, stored, or disposed of. (Health & Saf. Code, § 18908, subds. (a), (b).) "Structure" generally means that which is built or constructed, an edifice or building of any kind or any piece of work artificially built or composed of parts joined together in some definite manner. (Health & Saf. Code, § 18908, subd. (a).) The statute, however, specifically provides

that special purpose commercial coaches, among other things,[1] are not structures. (*Ibid.*) A "special purpose commercial coach" means a vehicle with or without motive power, designed and equipped for human occupancy for industrial, professional, or commercial purposes, which is not required to be moved under permit, and shall include a trailer coach. (Health & Saf. Code, § 18012.5.) An example of a special purpose commercial coach is a mobile food preparation unit, also known as a food truck or a catering truck.

Based on the statutory language above, while the definition of "building" may not be limited to a permanent structure, catering trucks are specifically excluded from the definition. Therefore, a catering truck from which cigarettes or tobacco products are sold is not a building or vending machine and, accordingly, may not be licensed as a retail location.

> (2) Does a licensed retailer who has a store front need to be registered with an additional license if they are making periodic sales at a flea market, festival, wedding, fair, etc.? Special Taxes has interpreted BPC § 22972 to mean that any physical location where a retailer is making a sale or where retail transactions occur needs to be licensed prior to offering cigarettes or tobacco products for sale. Following along with the reasoning illustrated in question 1, as long as a physical address is attributable to the location where sales are to be made, a retailer license for that location needs to be obtained by the retailer making the sale.

A retailer that owns or controls more than one retail location must obtain a separate license for each retail location. (Bus. & Prof. Code, § 22972.) As stated above, a "building" is not limited to a permanent structure. It is our opinion that, unless specifically excluded, any building or structure—whether permanent or temporary—from which cigarettes or tobacco products are sold may be treated as a retail location. We agree that an identifiable street address for each location where sales may take place is necessary for licensing purposes. (See Bus. & Prof. Code, § 22973, subd. (a)(2), which requires the retailer license applicant to provide the address of each retail location.) Therefore, it is our opinion that a licensed retailer with a permanent retail location must obtain a separate retailer's license for sales made at booths or stands at flea markets, festivals, etc.

> (3) Does a one-time event seller qualify as a "retailer" under the definition of retailer in BPC § 22971(p)? Special Taxes currently will allow a one-time event seller to register as a "retailer." SUTD's process for purposes of issuing a seller's permit lists their "business address" as their home address and each one-time event location is listed on their account as a sub location (to ensure local taxes are reported to the proper jurisdiction). Because the seller holds a seller's permit and the sub location is listed on the account, Special Taxes would be able to issue a retailer license for each of those locations.

A "retailer" is a person who engages in this state in the sale of cigarettes or tobacco products directly to the public from a retail location, and includes a person who operates vending machines from which cigarettes or tobacco products are sold in this state. (Bus. & Prof. Code,

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[1] Section 18908 specifically excludes from the definition of structure any mobilehome, as defined in Section 18008, manufactured home, as defined in Section 18007, special purpose commercial coach, as defined in Section 18012.5, and recreational vehicle, as defined in Section 18010.

§ 22971, subd. (p).) There is no requirement that there be multiple sales or that sales take place at multiple events for a person to be considered a retailer under this definition; a one-time sale from a retail location is sufficient. Therefore, we agree that a one-time event seller making sales from a retail location is a retailer as defined in section 22971, subdivision (p), and should obtain a retailer's license for each location where an event is being held.

> (4) Does a location need to be registered as a "retail location" if no sales are to be made but instead cigarette and tobacco products are to be given away to attendees without cost to the recipients at the event? Special Taxes would not require that a retailer license be obtained for a demonstration/free give away of tax paid product if no sales are to take place, because no retail transactions of cigarettes or tobacco products are being conducted. An example of the above scenario would be a "cigar roller" who has a seller's permit and who also has a retail cigarette and tobacco license for a retail location. The roller brings the tax paid product from his location to roll at the event and hand out the product without cost to attendees.

A location is considered a retail location only when there is a retail sale made from that location. (Bus. & Prof. Code, § 22971, subd. (q).) "Sale" includes any transfer of title or possession for a consideration, exchange or barter, in any manner or by any means whatever. (Rev. & Tax. Code, § 30006.) When cigarettes or tobacco products are transferred without consideration, no sale has occurred. If no sale has occurred, the location is not regarded as a retail location and thus no retailer's license is required. Therefore, we agree that a retailer's license would not be required based solely on product being handed out at an event without cost to the attendees.

> (5) Would the response to question 4 change if the cigar roller charged the event host for his rolling services (i.e., flat fee per hour) but still gives away the tax paid product without charge to the attendees? Special Taxes would not require a retailer license for said activity since the fee paid is not attached to a sale of product but instead to a service. The license requirement is not met since it is attached to the sale of cigarettes and tobacco products not a service.

As discussed above, if the product is given away and not sold, a retailer's license is not required for that location. We agree that in your example the fee paid by the event host is for the rolling services offered and any cigarettes or tobacco products given to attendees without charge are incidentally used by the cigar roller in rendering the service. Therefore, it is our opinion that a retailer's license is not required at such an event even when the host pays a service fee.

Under different facts, however, an event cigar roller may make retail sales of cigarettes or tobacco products and be required to obtain a retailer's license. For example, if the attendees pay a charge to attend the event and the attendees pay that charge with the expectation of receiving a cigar or cigars (perhaps the attendees are informed in advance that they will receive a cigar if they pay to attend), that charge (or a portion of the charge) would be consideration paid in exchange for transfer of title to and possession of the cigar or cigars. In other words, sales would occur. As explained above, a person making retail sales of cigarettes or tobacco products must obtain a separate retailer license for each retail location where such sales occur. An event location can be a retail location.

(6) If sales are allowed at a location other than a store front with a permanent structure, like a flea market or street fair, would the retailer be required to have one year of records on hand at each event per BPC § 22974? Would the invoice requirement extend to the product in his possession/offered for sale at the location during the course of the event? Special Taxes has never addressed this question before but it is believed that if you are licensed as a retailer you would be required to either have one year of records available at the retail location (place sales are to be made) or would be required to produce them upon request for a random inspection as per BPC § 22974.

Retailers are required to maintain records of purchases of cigarettes and tobacco products at the retail location for at least one year after the purchase, and these records must be made available upon request during normal business hours for review inspection by the board. (Bus. & Prof. Code, § 22974.) As discussed above, retailers must obtain a separate retailer's license for each retail location where sales are made. As licensed retailers, they are subject to the requirements set forth in section 22794. As such, retailers at special events such as flea markets or fairs must maintain one year of invoices and be prepared to make the invoices available in the event of an inspection. Because section 22974 requires that inspections occur during normal business hours, it is our opinion that these inspections may only occur during the course of the special event. Therefore, these retailers must have the invoices available at the time of the event and for the entire inventory available for sale at the event.

Please let me know if you have any questions about the information provided here or would like further assistance regarding this matter.

PAM/yg [redacted]

cc: Mr. Richard Parrott (MIC:88)
Ms. Debbie Kalfsbeek (MIC:31)

Legal Opinion Dated August 14, 2012

Relating to the Hazardous Substances Tax

Environmental (Corporation) Fee

State of California

Board of Equalization
Legal Department - MIC:82
Telephone: (916) 323-3142
Facsimile: (916) 323-3387

Memorandum

To: Debbie Kalfsbeek
Interim Director
Program Policy & Administrative Branch (MIC:31)

Date: August 14, 2012

From: Carolee D. Johnstone
Tax Counsel III (Specialist)
Tax and Fee Programs Division (MIC:82)

Subject: **Environmental Fee: Calculation of Hours Employed In California**
Assignment No. 12-234

This is in response to your request of May 16, 2012, to Acting Assistant Chief Counsel Christine Bisauta. You state that special tax and fee staff have received several inquiries regarding a 2006 annotation that clarifies how, for purposes of what is commonly referred to as the "environmental fee,"[1] the number of hours an employee is "employed" in California should be calculated. In light of the several concerns that have been raised regarding this annotation, you request that the Legal Department review the March 21, 2006, legal opinion from which the annotation was taken to determine if it is still valid. If it is still valid, you request that the opinion be reissued to address these concerns.

It is our conclusion, after thorough review of the relevant law, that the opinion and, therefore, the annotation are still valid. Each of the concerns raised is stated and addressed below.

To begin, the "environmental fee" (also referred to as the "corporation fee" prior to July 2006) is imposed on "organizations[2] that use, generate, store, or conduct activities in this state related to hazardous materials, as defined."[3] (Section 25205.6, subd. (b).) Organizations with 50 or more employees are required to pay a tiered flat fee, the rate of which is based upon the number of employees the organization employs in this state. The tiered flat fee rate increases with the number of persons employed. For calendar year 2012, the fee ranges from $291 for organizations with 50 to 74 employees to $13,850 for organizations with 1,000 or more employees. (BOE Web site, www.boe.ca.gov/sptaxprog/.) The language of the statute at issue here currently reads:

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[1] Health and Safety Code section 25205.6, referred to hereafter as Section or § 25205.6. The "environmental fee" is administered by the Board of Equalization (BOE) pursuant to the Hazardous Substances Tax Law (part 22 (commencing with section 43001) of division 2 of the Revenue and Taxation Code), on behalf of the Department of Toxic Substances Control (DTSC) that administers the hazardous waste programs funded by the environmental fee.

[2] "Organization" is defined as "a corporation, limited liability company, limited partnership, limited liability partnership, general partnership, and sole proprietorship." (Section 25205.6, subd. (a).)

[3] Prior to July 2006, the fee was imposed only on corporations with employees employed in California. Effective July 18, 2006, Section 25205.6 was amended to expand the class of businesses subject to the fee to "organizations," as defined. (See Stats. 2006, ch. 77 (AB 1803); Note foll. § 25205.6.)

> For purposes of [Section 25205.6], the number of employees employed by an organization is the number of persons employed in this state for more than 500 hours during the calendar year preceding the calendar year in which the fee is due. (Section 25205.6, subd. (e).)

As noted, Section 25205.6 was amended effective July 18, 2006, after the March 21, 2006, legal opinion was issued. However, the only change to subdivision (e) (which was subdivision (d) when the opinion was issued) was the substitution of "an organization" for "a corporation"; the subdivision otherwise reads the same as it did in March 2006. Section 25205.6 has not been amended subsequent to the July 2006 amendment.

The annotation, which was taken from the March 21, 2006, opinion, reads:

> Once a person is hired as an employee, the employer has control over how that employee spends the hours of the workday, including whether or not to grant paid time off during those workday hours for vacation, illness, and holidays and whether or not the employee must work his or her assigned hours on a particular workday. Therefore, for the purposes of the Environmental Fee statute and calculation of the number of employees "employed [in California] for more than 500 hours," the term "employed" includes the hours for which an employee is paid by the corporation, even when the employee is absent due to vacation, illness, or holidays, for the duration of his or her employment. On the other hand, once the person is no longer employed by the corporation—i.e., is no longer "engage[d], suffer[ed], or permit[ted] to work," the employer no longer "has . . . control [or] determination of the hours of work" of the employee. Therefore, any hours included in the calculation of a terminated employee's severance pay or sick or vacation time cash out should not be included when calculating the number of hours a person was employed during a calendar year for purposes of determining the Environmental Fee owed by the corporation for that year. 3/21/06. (Emphasis added.)

The issue presented is whether or not the method set forth in the annotation for calculating the number of hours an employee is "employed" is still valid for purposes of determining the number of persons employed by an organization in California during the prior year.

CONCERNS AND RESPONSES

1. Since 2006, there have been changes in labor laws and how companies are required to compensate employees.

First, there have been no changes in the relevant labor laws since 2006. The federal and state labor laws on which the March 21, 2006, opinion relied have not been revised since the opinion was issued. Specifically, California Labor Code section 50.6, which permits the California Department of Industrial Relations to assist and cooperate with the Wage and Hour Division of the United States Department of Labor in enforcing the Fair Labor Standards Act of 1938, title 29 of the United States Code, section 201 and following (FLSA), has not been amended since it was added in 1953. Further, none of the definitions, including the definition of "employ," provided by Section 203 of the FLSA, have been amended since 1999.

Furthermore, none of the wage orders issued by the California Industrial Welfare Commission (Cal. Code Regs., tit. 8, §§11010- 11160), including Wage Order No. 4 referenced in the opinion (*id.* at § 11040), has been revised since 2002. The definition of "hours worked" in Wage Order No. 4 still states that "hours worked" is defined as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (*Id.* at § 11040, subd. 2(K) [emphasis added].)[4]

Lastly, I have confirmed that the case law cited in the opinion is still good law. Accordingly, the labor laws on which the March 21, 2006, opinion relied have not changed since the opinion was issued.[5]

2. The inclusion of "time off" should not be included in the computation of the hours employed since the employees would not be at the workplace that would be considered to have exposure to hazardous materials.

The Environmental Fee is imposed on organizations that, in their everyday business pursuits, use, generate, store, or conduct activities in this state related to hazardous materials, as defined. These materials include such ubiquitous items as printer and fax machine toner, inks, correction fluid, fluorescent light bulbs, and batteries. (*Morning Star Co. v. Bd. of Equalization* (2011) 201 Cal.App.4th 737, 744.) The revenues from the fee are available "for the purposes specified in subdivision (b) of Section 25173.6." (§ 25205.6, subd. (d).) "Section 25173.6, subdivision (b) authorizes the appropriation of section 25205.6 funds primarily to remediate, clean up and dispose of hazardous materials, rather than to regulate the payers' business activities in using, generating or storing hazardous materials." (*Morning Star Co. v. Bd. of Equalization* (2011) 195 Cal.App.4th 24, 37 [emphasis added].)

In other words, the fee is not imposed for the purpose of preventing or remediating the organization's employees' exposure to these materials or to provide a direct burden or benefit to the employees or the employer. Rather, it is more like a tax in that the funds are used for pollution prevention and remediation of contaminated soil and groundwater to protect California's environment where funds are not otherwise available. In a broad sense, all Californians benefit from the fee through cleaner soil and groundwater. (DTSC's Final Statement of Reasons, November 7, 2007, Environmental Fee (R-2006-03).)

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[4] See also Cal. Code Regs., tit. 8, § 11010, subd. 2(G), § 11020, subd. 2(G), § 11030, subd. 2(H), § 11050, subd. 2(K), § 11060, subd. 2(G), § 11070, subd. 2(G), § 11080, subd. 2(G), § 11090, subd. 2(G), § 11100, subd. 2(H), § 11110, subd. 2(H), § 11120, subd. 2(H), § 11130, subd. 2(G), § 11140, subd. 2(G), § 11150, subd. 2(H), § 11160, subd. 2(J) (i.e., Wage Orders No. 1 through 3 and 5 through 16, all of which define "hours worked" in exactly the same terms).

[5] We do note that, in 2007, in addition to these laws, the DTSC, as directed by the California Supreme Court in *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 342, promulgated a new regulation for the purpose specifying which organizations "use, generate, store, or conduct activities in this state related to hazardous materials" and are, accordingly, subject to the environmental fee. (§ 25205.6, subds. (b) & (c); Cal. Code Regs., tit. 22, § 66269.1 (Regulation 66269.1); Gov. Code, § 11342.600.) Among other things, Regulation 66269.1 defines "employee," for purposes of the environmental fee, by reference to the definition of the term "employee" in the Unemployment Insurance Code. (*Id.* at subd. (a)(1); see Unemp. Ins. Code, §§ 621-623.) However, these provisions relate to determining if a person is an employee of an organization in the first place (which is beyond the scope of this discussion), not to what it means to be "employed . . . for more than 500 hours" (§ 25205.6, subd. (e)) or how to calculate the number of hours such employee was employed by the organization in the previous calendar year, once it is determined the person is an employee of the organization.

In contrast, for example, under the Occupational Lead Poisoning Prevention (OLPP) Act,[6] the Department of Public Health (DPH) is charged with establishing and maintaining an OLPP program that includes, among other things, monitoring cases of adult lead toxicity, following cases of occupational lead poisoning, and making recommendations for prevention of lead poisoning. (Health & Saf. Code, § 105185, subd. (a).) The OLPP fee is imposed on employers in certain Standard Industrial Classifications (SICs)[7] for which the DPH has documented evidence of potential occupational lead poisoning. (*Id.* at § 105190, subds. (a) & (f).) The revenues from the OLPP fee are to be expended for the purposes of the OLPP program. (*Id.* at § 105190, subd. (f).) The OLPP fee is also a flat fee, based on the number of employees employed by the employer, but the amount of the fee is determined by whether the employer is within Category A of the SIC (for which fewer than 20 persons have been reported with elevated blood lead levels in the prior three years) or Category B of the SIC (for which 20 or more persons have been reported with elevated blood lead levels in the prior three years), not by how many hours an employee was employed in California.

The Environmental Fee is not calculated based on the amount of time employees are exposed to the hazardous materials an organization may use, generate, store, or to which the organization may conduct related activities. The Legislature chose to rely upon the number of hours employed to determine, in a general manner, how much of these materials an organization may likely generate or dispose of in a year and to define which persons employed should be included in that calculation. Generally speaking, the more employees an organization employs, the more hazardous materials the organization will likely use, generate, store, or conduct activities related to these materials. The Legislature decided that it would not include in the calculation persons who were employed for less than one-fourth of the year (i.e., 500 or fewer hours). On the other hand, with respect to the OLPP program, all persons employed by the subject employer are exposed to the potential for lead poisoning, so all employees are included in the calculation of the fee regardless of the number of hours employed.

3. Labor laws require that certain paid time off, such as sick leave and vacation, not be included in some computations under labor-related statutes, such as the Family and Medical Leave Act (FMLA), and this is very confusing.

Some computations under certain labor-related statutes may not include hours of paid time off, such as for sick leave and vacations, but the provisions of such unrelated labor-related laws are not appropriate for determining the "number of persons employed . . . for more than 500 hours during the calendar year" under Section 25205.6. Those computations are established for the purposes of those unrelated laws, not for labor matters in general. For the definition of "hours employed" for purposes of Section 25205.6, subdivision (e), we must look to the laws that are generally applicable to labor matters, the primary federal and state labor law statutes and regulations relied on in the March 21, 2006, opinion and cited above.

An employer certainly knows the number of hours for which it pays each of its employees and how many of those hours were worked or taken as sick leave or vacation (or jury duty or other paid time off). Any confusion that may be occurring is not being generated by the "number of employees employed" calculation called for under Section 20525.6, as described in the

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[6] Chapter 2 (commencing with section 105175) of part 5 of division 103 of the Health and Safety Code .
[7] As specified in Health and Safety Code section 105195.

March 21, 2006 opinion, but is, more likely, generated by calculations required to be made for purposes of the Family and Medical Leave Act and any other labor-related statutes that are alluded to.

Based on the foregoing, we conclude that the March 21, 2006, opinion and annotation quoted above are still valid. As such, the substantive portion of the March 21, 2006, opinion is reissued, as you have requested, as follows (modified as appropriate to reflect the July 18, 2006, amendments).

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Legal Opinion: Request for Advice Regarding Whether Time Off for Vacation, Illness, and Other Paid Absences Must Be Counted as "Work Hours" for Purposes of Determining the Number of Employees Under the Environmental Fee, dated March 21, 2006, reissued August 16, 2012 (redacted and updated to reflect amendments to the underlying statute).

. . . .

The relevant provision is subdivision (e) of Section 25205.6,[8] which states:

> For purposes of this section, the number of employees employed by an organization is the number of persons employed in this state for more than 500 hours during the calendar year preceding the calendar year in which the fee is due.

(Health & Safety Code, section 25205.6, subdivision (e) [emphasis added].)

No other comments or information is provided in the Environmental Fee Law as to what constitutes "employed" or how the 500 hours should be calculated.[9] Please note, however, that, regardless of what terms may be used in the Environmental Fee return or any Board of Equalization publication, the operable term with regard to the "500 hours" is "employed," not "worked."

[8 This footnote was not in the original opinion and is added to fill in for information that has been redacted and to update the statute that is the subject of the opinion, which has been amended since the original opinion was issued. The environmental fee imposed under Health and Safety Code section 25205.6 initially only applied to corporations that "use, generate, store, or conduct activities in this state related to hazardous materials." (*Id.* at § 25205.6, subd. (b).) Due to an amendment to the statue, since July 18, 2006, the fee has been expanded to apply to organizations. The term "a corporation" in what was previously subdivision (d) has been replaced with the term "an organization" (as defined in subd. (a)) in what is now subdivision (e) and throughout the statute and the opinion.]

[9 This footnote was not in the original opinion, but we note that, in 2007, after the original opinion was issued, a regulation, California Code of Regulations, title 22, section 66269.1 was promulgated that defined "employee" by reference to the Unemployment Insurance Code (UIC). The UIC, however, does not provide a definition of the term "employed." There is considerable case law that interprets and applies the provisions of the UIC, particularly with respect to what factors are relevant to determining that an "employment relationship," as opposed to an "independent contractor relationship" exists for purposes of imposing liability for the unemployment insurance tax. (See, e.g., *Tieberg v. Unemployment Insurance Appeals Bd.* (1970) 2 Cal. 3rd 943, 946 ["The principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired" (emphasis added)].) While similar to the "control" test with respect to "employ" described below, once the employment relationship is established, this test is not relevant to the determination of how many hours an employee is employed during a calendar year. Therefore, the new regulation does not substantively affect this analysis.]

Turning elsewhere, the terms pertaining to employment and hours worked are generally defined in the California Labor Code (Labor Code), which governs employer-employee matters in California, in collaboration with the federal administrators of the Fair Labor Standards Act of 1938, title 29 of the United States Code, section 201 and following (FLSA). (Lab. Code, § 50.6.)

FLSA defines "employ" as "to suffer or permit to work." (29 U.S.C.A. § 203(g).) Case law provides some guidance, commenting that the definition of the terms "employee"[10] and "employ" under the FLSA "contemplate[] (a) a situation in which the employer . . . agrees to pay a certain sum to the employee, and (b) has the control and determination of the hours of work by the employee." (*Huntley v. Gunn Furniture Co.* (W.D. Mich. 1948) 79 F.Supp. 110, 116 [cited by Ninth Circuit in *Gilbreath v. Cutter Biological, Inc.* (9th Cir. 1991) 931 F.2d 1320, 1330].)

The Labor Code itself provides only a few definitions, none of which are relevant to this inquiry. However, several relevant definitions are provided in regulations promulgated by the California Industrial Welfare Commission under the auspices of the Department of Industrial Relations and the Labor Code, specifically in section 11040 of title 8 of the California Code of Regulations (CCR). This section is also known, generally, as "Wage Order No. 4" and is applicable, as relevant here, to persons employed by private employers in California who are engaged in managerial, supervisorial, clerical, and office work occupations, such as accountants, bookkeepers, clerks, computer programmers and operators, secretaries, and typists, which would appear to fit the operations of your organization.

In Wage Order No. 4, "employ" is defined as "to engage, suffer, or permit to work." (8 CCR § 11040, subd. 2.(E) [emphasis added].) The addition of the word "engage" suggests that once a person is hired as an employee, that person is "employed," as the term in used in the Environmental Fee statute. However, Wage Order No. 4 also defines "hours worked" to mean "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (8 CCR § 11040, subd. 2(K) [emphasis added].)[11] This definition brings together the FLSA and Labor Code definitions of "employ" and the case law that discusses employer "control" in relation to the FLSA definition.

Based on this discussion, it is reasonable to conclude that, once a person is hired as an employee, the employer has control over how that employee spends the hours of the workday, including whether or not to grant paid time off during those workday hours for vacation, illness, and holidays and whether or not the employee must work his or her assigned hours on a particular workday. Therefore, for the purposes of the Environmental Fee statute and calculation of the number of employees "employed [in California] for more than 500 hours," the term "employed" includes the hours for which an employee is paid by your organization, even while absent due to vacation, illness, or holidays, for the duration of his or her employment.

On the other hand, once the person is no longer employed by your organization – i.e., is no longer "engage[d], suffer[ed], or permit[ted] to work," the employer no longer "has . . . control [or] determination of the hours of work" of the employee. Therefore, it is also reasonable to conclude that any hours included in the calculation of a terminated employee's severance pay or sick or

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[10] "Employee" is defined by the FLSA as "any individual employed by an employer." (29 U.S.C.A. § 203(e)(1).)
[11] The FLSA also defines "hours worked," but the definition only deals with time spent "changing clothes or washing at the beginning or end of each workday," which is not at issue here. (29 U.S.C.A. § 203(o).)

vacation time cash out should not be included when calculating the number of hours a person was "employed" during a calendar year for purposes of determining the Environmental Fee owed by your organization for that year.

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Please let me know if you have any questions.

CJ/mcb
[redacted]

cc: [redacted] Department of Toxic Substances Control
Lynn Bartolo (MIC:57)

Legal Opinion Dated October 10, 2012

Relating to the Hazardous Substances Tax

Environmental (Corporation) Fee

State of California

Board of Equalization
Legal Department - MIC:82
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Memorandum

To: Debbie Kalfsbeek
Acting Administrator
Program Policy and Administration Branch (MIC:31)

Date: October 10, 2012

From: Carolee D. Johnstone
Tax Counsel III (Specialist)
Tax and Fee Programs Division (MIC:82)

Subject: **Environmental Fee and Job Corps Center Operators and Service Providers**
Assignment No. 12-415

This memo is in response to your September 17, 2012, request for a legal opinion regarding the application of the California Environmental Fee[1] to Job Corps center operators and service providers, pursuant to an inquiry received by the Board of Equalization (BOE). You ask, first, if Job Corps center operators and service providers are exempt from liability for the Environmental Fee under section 158(d) (codified as 29 U.S.C.[2] § 2898) of the federal Workforce Investment Act of 1998 (Act).[3] If not, you ask if they are exempt on any other basis as a "U.S. Government Corporation," as stated in the instructions for completing the Environmental Fee Return (BOE-501-EF (S2) REV. 19 (3-11)). In addition, you ask for clarification as to how to properly identify an entity as a "U.S. Government Corporation" that would be exempt from paying the Environmental Fee.

As discussed in detail below, although Job Corps center operators and service providers are not exempt from liability for the Environmental Fee under section 158(d) of the Act, they are exempt from paying the Environmental Fee as federal instrumentalities.

BACKGROUND

Relevant Law

"[O]rganizations that use, generate, store, or conduct activities in this state related to hazardous materials, . . . including, but not limited to, hazardous waste," are required to pay the Environmental Fee. (Health & Saf. Code, § 25205.6 (Section or § 25205.6), subds. (b) & (c).) An "organization" is "a corporation, limited liability company, limited partnership, limited liability partnership, general partnership, [or] sole proprietorship." (§ 25205.6, subd. (a).) As

[1] Health and Safety Code section 25205.6; also known as the "Corporation Fee" prior to July 18, 2006.
[2] All future statutory references will be to title 29 of the United States Code (29 U.S.C.) unless indicated otherwise.
[3] P.L. 105-220, Aug. 7, 1998, HR 1385.

determined by the Department of Toxic Substances Control (DTSC), all organizations (with one exception not relevant here) with 50 or more employees employed in California for more than 500 hours in a calendar year are liable for the Environmental Fee.[4] (§ 25205.6, subds. (c), (e) & (h); Cal. Code Regs., tit. 22, § (Regulation or Reg.) 66269.1, subd. (d).) Recently, on December 7, 2011, California's Third District Court of Appeal concluded that Environmental Fee imposed under Section 25205.6 is a constitutionally valid tax, not a fee. (*Morning Star Co. v. Bd. of Equalization* (2011) 201 Cal.App.4th 737, 742.)

Section 25205.6, Regulation 66269.1, and the Hazardous Substances Tax Law in the Revenue and Taxation Code (R&TC) are essentially silent with respect to the United States government, its agencies and instrumentalities. Neither Section 25205.6, nor Regulation 66269.1, nor the Hazardous Substances Tax Law contains any provision that imposes the fee on, or exempts from the fee, the United States government, its agencies and instrumentalities. R&TC section 43006 does include in the definition of "person" a "government corporation" and "the United States and its agencies and instrumentalities to the extent permitted by law" (emphasis added), and R&TC section 43012 provides that "taxpayer" is "any person liable for the payment of a fee or a tax specified in," as relevant here, Health and Safety Code (H&SC) section 25174, subdivision (a) (emphasis added). On the other hand, Section 25205.6 is not one of the tax or fee provisions specified in H&SC section 25174. In addition, neither Section 25205.6 nor Regulation 66269.1 uses the term "person" as it relates to imposition of the fee.

More generally, under the United States Constitution, states are prohibited by the supremacy clause (art. VI, § 2) from imposing any tax on any activity, agency, or instrumentality of the federal government unless Congress expressly waives the federal government's sovereign immunity from state taxation under specific circumstances. (See *Novato Fire Protection Dist. v. United States* (9th Cir. 1999) 181 F.3d 1135, 1138 [citing *McCulloch v. Maryland* (1819) 17 U.S. (4 Wheat.) 316 (1819 U.S. LEXIS 320, ***107-110); *United States v. Allegheny County* (1944) 322 U.S. 174, 176].) The Supreme Court determined, early on, that the supremacy clause "precludes a state from levying a tax on the operations of the United States." (*Ibid.*) The Supreme Court also expressed in *Department of Energy v. Ohio* (1992) 503 U.S. 607 that it is a "common rule" that "any waiver of the National Government's sovereign immunity must be unequivocal, [and] [w]aivers of immunity must be 'construed strictly in favor of the sovereign[]' [and] not 'enlarged . . . beyond what the language requires.'" (*Id.* at p. 615 [internal quotes and citations omitted]; see also *Orff v. United States* (2005) 125 S.Ct. 2606, 2610; *United States v. Torres (In re Torres)* (1st Cir. 2005) 432 F.3d 20 [2005 U.S. App. Lexis 27768, *10].)

Job Corps

With respect to Job Corps center operators and service providers, a Job Corps was established within the Department of Labor (DOL) (29 U.S.C. § 2883), and an Office of Job Corps was established within the Office of the Secretary in the DOL (§ 2883a). The head of the Office of Job Corps is "a senior member of the civil service" appointed by the Secretary of Labor, receives funds from the Secretary to carry out the Job Corps program, and has contracting authority. (§

[4] The Environmental Fee is administered by the BOE pursuant to the Hazardous Substances Tax Law, part 22 (commencing with section 43001) of division 2 of the Revenue and Taxation Code. The fee is imposed under chapter 6.5 (commencing with section 25100), entitled Hazardous Waste Control Law, of division 20 of the Health and Safety Code, which is administered by the DTSC.

2883a.) These provisions support a conclusion that the Office of Job Corps is "the United States" for purposes of the Environmental Fee.

On the other hand, a Job Corps center operator or service provider is merely a contractor that performs certain functions pursuant to a contract with the DOL (e.g., §§ 2887, 2888, 2891, 2892, 2899), so it cannot be the "United States." The DOL may contract with a federal agency to be a Job Corps center operator, so in some instances an operator may be an "agency" of the United States. (§ 2887(a)(1)(A).) However, in other instances, the operator may be a state or local agency, a vocational school, or a private organization. (§ 2887(a)(1)(A).) Service provider contracts are between the DOL and local entities. (§ 2887(a)(1)(B).)

DISCUSSION

1. Job Corp center operators and service providers are not exempt from the Environmental Fee pursuant to the section 158(d) of the Workforce Investment Act

Section 158(d) of the Act states, in relevant part, that:

> [An] entity that is an operator or service provider for a Job Corps center . . . shall not be liable . . . to any State . . . for any gross receipts taxes, business privilege taxes measured by gross receipts, or any similar taxes imposed on, or measured by, gross receipts in connection with any payments made to or by such entity . . . . Such an operator or service provider shall not be liable to any State . . . to collect or pay any sales, excise, use, or similar tax imposed on the sale to or use by such operator or service provider of any property, service or other item in connection with the operation of or provision of services to a Job Corps center. (§ 2898(d) [emphasis added].)

Congress originally adopted essentially the same provision when it enacted section 12 of the Job Training Partnership Act (JTPA) Amendments of 1986 (which amended section 437(c) of the JTPA [§ 1707(c), the predecessor to § 2898(d)]).[5] It was clear from this language that "contractors" who operate Job Corps centers (as the entities were originally referred to in the JTPA) were exempt from collecting or paying state or local sales or use taxes imposed by California and its subdivisions; accordingly, the Legal Department of the Board of Equalization (Board) issued a legal opinion, dated June 12, 1987, that generated Sales and Use Tax (SUT) annotation 505.0230.[6] However, this annotation is only applicable to taxes imposed under the SUT Law[7] and to taxes imposed under other laws that are "similar" to sales and use taxes.

The question here is whether the Environmental Fee is "similar" to the types of taxes listed in section 2898(d). Unfortunately, the language of the statute is ambiguous. In other words, is the phrase "use by" to be interpreted to stand on its own, so that Job Corps center operators and service providers would be exempt from paying any tax that is determined to be imposed on their

[5] The terms used in these two statutes have been revised over the years (e.g., "entity" for "contractors"), but the substantive provisions remain exactly the same today.

[6] SUT annotation 505.0230 opined that, pursuant to section 1707, "a sale of tangible personal property to or by, or purchase of tangible personal property by, the operator of a Job Corps Center, program, or activity under contract with the U.S. Department of Labor is exempt from sales or use tax."

[7] Part 1 (commencing with section 6001) of division (2) of the Revenue and Taxation Code.

"use" of "any property . . . or other item" (and, it could be argued, the Environmental Fee is imposed on their "use" of hazardous materials), or should the phrase "use by" be modified by the phrase "imposed on, or measured by, gross receipts"? Fortunately, both the U.S. House of Representatives and the U.S. Senate inserted a joint explanatory statement into the Congressional Record with respect to the 1986 amendments, which included a comment about section 12 (i.e., § 1707(c)), as follows:

> The bill amends section 437(c) [of the JTPA] to ensure that all Job Corps activities and transactions . . . which are carried out pursuant to contracts with the Secretary [of Labor] by either for-profit or non-profit Job Corps contractors are exempted from all State gross receipts, excise, sales, use, business privilege, or similar taxes (such as occupational taxes) measured by gross receipts. This language is fully consistent with the original Congressional intent of the Act, and is supported by the Department of Labor. (Remarks of Rep. Hawkins [California] on S. 2069, 99th Cong., 2d Sess., 132 Cong. Rec. H 8806 (daily ed. Oct. 1, 1986).)

It is evident from this language that Congress intended for Job Corps center operators and service providers to be exempt from all state and local taxes that are imposed on, or measured by, gross receipts, and that Congress did not intend for them to be exempt from paying state or local taxes that are imposed on, or measured by, other than gross receipts. The Environmental Fee is imposed on "organizations that use, generate, store, or conduct activities in this state related to hazardous materials" and is measured by the number of persons employed by the organization, not on or by gross receipts. Accordingly, although they are exempt from collecting and paying California and local sales and use taxes, Job Corps center operators and service providers are not exempt, under the Act, from paying the California Environmental Fee.

2. Job Corps center operators and service providers are exempt from liability for the Environmental Fee as federal instrumentalities

Although we conclude that Job Corps center operators and service providers are not exempt from paying the Environmental Fee under section 158(d) of the Act, they may be exempt from paying the Environmental Fee as instrumentalities of the United States.

An entity may be determined to be a federal instrumentality, and, therefore, have immunity, for some purposes (e.g., from state taxation) but not for other purposes (e.g., from lawsuit under the Federal Tort Claims Act). (*Lewis v. United States* (9th Cir. 1982) 680 F.2d 1239, 1242-1243 (*Lewis*).) The test for determining whether an entity may be a federal instrumentality, for purposes of immunity from state and local taxation, "is very broad." (*Id.* at p. 1242.) The test "is whether the entity performs an important governmental function." (*Ibid.* [emphasis added].) Stated another way, "tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, as least insofar as the activity being taxed is concerned." (*United States v. New Mexico* (1982) 455 U.S. 720, 735 [emphasis added].) Further, "to resist the State's taxing power, a private taxpayer must actually 'stand in the Government's shoes'" (*id.* at p. 736 [citation omitted]); the taxpayer must be "'virtually . . . an arm of the Government'" (*ibid.* [citation omitted]). The U.S. Supreme Court determined that the American Red Cross is a federal instrumentality and immune from state taxation because, in addition to being under government supervision and managed by

government appointees, it provides a wide variety of functions indispensable to the working of the Armed Forces and assists the federal government in providing disaster assistance in time of need. (*Dept. of Employment v. United States* (1966) 385 U.S. 355, 358-360.)

Relying on these and other court opinions, the Board's Legal Department concluded that, in order to determine if the Air Force Academy Athletic Association was a federal instrumentality for purposes of the sales and use taxes, this entity would (1) "have to be an integral part of [here] the Air [F]orce" and (2) "charged with an essential function in the operation of the Air Force," and (3) "the degree of supervision by the Air Force would have to be more than casual or perfunctory." (Legal Opinion by Ronald Dick, 6/4/90 [backup letter to SUT annotation 505.0045]; see also Memo from Kelly W. Ching to G. Jung, 7/11/95 [backup memo to SUT annotation 505.0377].[8])

Here, the Job Corps centers are integral to Congress's determination "to provide employment and training assistance to economically disadvantaged youth and adults and to workers dislocated from their jobs." (Remarks of Rep. Gunderson on S. 2069, 99th Cong., 2d Sess., 132 Cong. Rec. H 8806 (daily ed. Oct. 1, 1986).) The DOL, through its Office of Job Corps, may have been able to operate the Job Corps centers itself, but Congress directed the DOL (i.e., "[t]he Secretary shall") to enter into agreements with federal, state, and local agencies, vocational schools, and private organizations to operate each center, and permitted the DOL to enter into agreements with local entities to provide services to the centers. (§ 2887(a)(1).) In other words, the Job Corps center operators and service providers are an "integral part" of the Job Corps program and are "charged with an essential function in the operation of" the Job Corps program; without Job Corps centers, there would be no Job Corps program.

Further, the supervision provided by the DOL, through its Office of Job Corps, is considerably more than "casual or perfunctory." First, Congress specifies the activities that the center operators and service providers must perform (§ 2888(a)) and the standards of conduct they are expected to enforce, including the disciplinary measures to be taken (§ 2892). The DOL must: establish procedures to ensure each operator and service provider maintains an acceptable (as specified) management information system; perform audits of the center operators and service providers; establish indicators of performance; conduct annual assessments and develop and implement performance plans for underperforming centers; and report annually to the appropriate Congressional committees. (§ 2899.) In other words, the DOL closely supervises the Job Corps center operators and service providers, and Congress maintains oversight over the Job Corps program.

In addition, Congress provides the funding for the Job Corps center operators and service providers, through the contracts between the DOL and the operators and service providers (§ 2898, subd. (e)), and, although the operators and service providers are not government appointees, as are the managers of the American Red Cross, the DOL must make certain that each operator and service provider meets very stringent criteria before the DOL will enter into a contract with them (§ 2887). The DOL is also very closely involved in the recruitment, screening, selection, assignment, counseling, testing, and monitoring of the Job Corps program

[8] Annotations do not have the force or effect of law but are intended to provide guidance regarding the interpretation of the Sales and Use Tax Law with respect to specific factual situations. (Reg. 5700, subds. (a)(1), (c)(2).)

enrollees (§§ 2884-2886, 2889, 2899), even to the extent of providing personal allowances to the enrollees if the DOL determines it to be necessary or appropriate to meet their needs.

It was Congress's purpose to implement "a national Job Corps program . . . to assist eligible youth who need and can benefit from an intensive program . . . to become more responsible, employable, and productive citizens." (§ 2881(1).) Clearly, the operators of and service providers to the Job Corps centers "perform[] an important governmental function." (*Lewis, supra*, 680 F.2d at p. 1242.) Therefore, based on all of the foregoing, the entities that operate and provide service to Job Corps centers are determined to be "federal instrumentalities" for purposes of the Environmental Fee and are exempt from paying the fee pursuant to the supremacy clause of the United States Constitution, as discussed above. Lastly, the law does not support an assertion that Congress has waived federal immunity with respect to the Environmental Fee.[9]

3. The term "U.S. Government Corporations" should be replaced

The instructions to the Environmental Fee Return state that "U.S. Government Corporations" do not have to pay the fee. As noted above, neither Section 25205.6 nor Regulation 66269.1 exempts the federal government from liability for the Environmental Fee, let alone makes any mention of a "U.S. Government Corporation." We suspect that, sometime prior to July 18, 2006, when the Environmental Fee was imposed only on corporations, it was determined that, according to the supremacy clause of the United States Constitution, the federal government was not subject to the fee. So, turning to the definition of "person" (R&TC, § 43006), which includes a "government corporation," the combined term "U.S. Government Corporation" took form.

Now that the imposition of the Environmental Fee is no longer limited to corporations, we suggest that the term be replaced with the broader term "United States and its agencies and instrumentalities." Based on the discussion above, we concur that, regardless of the term used, the federal government, et al. is exempt from liability for the fee.

4. Identification of agencies and instrumentalities of the federal government

You have asked how staff may properly identify an entity as a U.S. Government Corporation that would be exempt from the Environmental Fee. However, based on case law and the discussion above, whether or not an entity is a "U.S. Government Corporation" is not relevant to whether or not the entity may be immune from state taxation. An entity included in the list of United States "government corporations" in 31 U.S.C. section 9101 is not necessarily an agency or instrumentality of the federal government that is exempt from state taxation. Similarly, entities that constitute federally chartered corporations, which are described in part B (commencing with

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[9] We have previously determined that Congress has expressly waived federal immunity with respect to other solid and hazardous waste fees (e.g., the California solid waste disposal facility fee, Public Resources Code section 48000, and the California hazardous waste facility fee, Health and Safety Code section 25205.2) under the Resource Conservation and Recovery Act of 1976 (RCRA), specifically 42 U.S.C. section 6961(a). However, it is our opinion that the RCRA waiver of immunity does not apply to the Environmental Fee because the Environmental Fee imposed under Section 25205.6 is not a "reasonable service charge" as defined in section 6961(a), in that the fee is deposited into the Toxic Substances Control Account, the funds from which may be appropriated for purposes other than a California "solid waste or hazardous waste regulatory program." (Health & Saf. Code, §§ 25173.6, subds. (a)-(c) & 25205.6, subds. (d) & (g); 42 U.S.C. § 6961(a) [reasonable service charges include "any other nondiscriminatory charges that are assessed in connection with a . . . State . . . solid waste or hazardous waste regulatory program" (emphasis added)].)

section 20101) of subtitle II of title 36 of the United States Code (pertaining to patriotic and national organizations), may or may not be federal instrumentalities. The American Red Cross is expressly a federal instrumentality (36 U.S.C. § 300100); the Civil Air Patrol is expressly not (36 U.S.C. § 40301; 10 U.S.C. § 9441).

So, the question more accurately is how the staff may properly identify an entity as the "United States" or as an "agency" or "instrumentality" of the United States for purposes of immunity, not only from the Environmental Fee but from any tax the BOE administers. Generally, identification of an entity as the United States government, itself, or as a federal agency may be reasonably easy to make by going to the entity's Web site. Federal instrumentalities may also be easily identified from express statutory language or an entity may be easily eliminated as an instrumentality, such as are the American Red Cross and Civil Air Patrol, respectively. However, where there is no statutory language expressly indicating that an entity is or is not a federal instrumentality, the entity must be analyzed as the Job Corps center operators and service providers have been here. Legal Department staff is available to assist you and your staff in making these determinations.

Please let me know if you have any questions about the information provided here or would like further assistance regarding this matter.

CDJ:mcb
[redacted]

cc: [redacted] Department of Toxic Substances Control